

MINUTES

MONTANA SENATE 56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON AGRICULTURE, LIVESTOCK AND IRRIGATION

Call to Order: By **SEN. PETE EKEGREN**, on February 3, 1999 at 3:14 P.M., in Room 413/415 Capitol.

ROLL CALL

Members Present:

Sen. Reiny Jabs, Chairman (R)
Sen. Walter McNutt, Vice Chairman (R)
Sen. Tom A. Beck (R)
Sen. Gerry Devlin (R)
Sen. Pete Ekegren (R)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Greg Jergeson (D)
Sen. Ken Mesaros (R)
Sen. Linda Nelson (D)
Sen. Jon Tester (D)

Members Excused: None.

Members Absent: None.

Staff Present: Carol Masolo, Committee Secretary
Doug Sternberg, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing(s) & Date(s) Posted: HB 254, HB 284, 1/29/99
Executive Action: HB 254, HB 284

SENATOR JERGESON noticed in the paper a couple weeks ago that some of our Montana Ag producers were petitioning Congress on a number of issues they think would help bolster the farm economy. He asked members of the committee to consider on Friday whether they would want to draft a committee bill of support for their efforts. Distributed copies of the petition.

SENATOR TESTER was contacted by a Senator from North Dakota on a country of origin labeling that North Dakota and Minnesota are going to do. He would like the committee to back him in introducing that bill, since the deadline for him to do it has long since passed. Country of origin bill covering everything from grain to beef to lettuce.

HEARING ON HB 254

Sponsor: **REPRESENTATIVE ROGER SOMERVILLE, HD 78, Kalispell**

Proponents: **Ralph Peck, Montana Dept. of Agriculture**
 Ron DeYong, Montana Farmers Union

Opponents: **None**

Opening Statement by Sponsor:

REP. ROBERT SOMERVILLE, HD 78, HB 254 allows promotion of research and market development of Montana mint and allows the mint community to contract with the Montana University system and other public and private organizations to research and develop alternative crops for mint in Montana. The intent of the research is to insure that the biology of any alternative crop suggested is well researched, includes market research to make sure there's a market and that it can be used within the mint boiler system the mint growers currently have. They also check to see if we want to encourage this before they try to replace their mint crop with an alternate crop.

Peppermint has been grown as a crop in the Flathead Valley and Montana for the last 20 years. In 1989 the Montana Mint Act was passed and the Montana Mint Committee was established. The committee consists of four mint growers, a representative of the Mint Industry Research Council and the Director of the Montana Dept. of Agriculture. The Mint Act established the assessment that was levied voluntarily on each pound of mint oil, currently at 8 cents. This funds the Mint Committee. The Mint Committee was authorized to use the assessment to enter into contract to improve the quality of mint, develop and improve control measures for disease and pests that attack the mint, and to improve mint growing cultures. Numerous research studies have been conducted in the 9 years since it was formed and have resulted in better disease and pest control methods, improved harvest techniques and new and improved mint varieties and improved marketing techniques.

When the committee found they couldn't promote and market their product, they asked us to bring forth a bill to allow them to do

the same as the grain growers. They need to be able to sell Montana Mint over other mint in the world.

Since the 1980's, introduction of Flathead mint has been a small but economical, significant crop for the producers as well as the rest of Montana. Prices for mint oil in the early and mid '90's remained relatively stable, but an influx of Asian mint oil in the world markets has brought an over development and has depressed Montana mint oil prices.

The intent of this committee is to continue the research and marketing for mint species and develop a market directly with the manufacturers so we don't have to go through a broker. We need to do research and development on other products that can be used with the boiler system the mint producers have. If we can find some alternative crop while mint oil prices are depressed they will then try to bring forth these alternative crops to help save those farms. I would like to pass out a letter of support from John Ficken who is from the Montana Mint Council, and Bruce Tutvedt, chairman of the Montana Mint Committee.

SEE **EXHIBIT(ags27a01)** and **EXHIBIT(ags27a02)**.

{Tape : 1; Side : A; Approx. Time Counter : 3:24}

Proponents' Testimony: Ralph Peck, Director, Montana Dept. of Agriculture, This was brought to our attention as the Mint Committee met last year and wanted to develop a brochure promoting Montana mint. We weren't able to use the fees to do that activity under the existing statute. We should do all we can to improve the Montana Mint market. The Growth through Agriculture Council assisted the Montana Mint Producers in providing funding for and alternative crops that could be grown with the university system. Both projects have been successful. The producers suggested the growers would have the same authority as the Montana Wheat and Barley Committee to enable them to invest their self-collected and produced funds, administered through the Mint Committee, in promoting their product and looking at alternative crops such as Echinacea that potentially would provide a high value return during times of low value on mint.

Ron DeYong, Montana Farmers Union and Montana Farm Bureau, It costs about \$10/lb. to raise mint oil and right now it's selling around \$8/lb. If you had some old contracts, you're looking at \$15/lb. The market has changed quite dramatically. We need to start looking at some marketing options and go straight to the end users. Right now the money off the mint all goes to a broker.

The oil is going to be different depending on where it's raised. The broker does a blending, because you have to have the same aroma every time it goes into the product. You can't depend upon one area. End users can do some blending, too, so we want to look at marketing options and we need the language in the bill to do that.

We also want to look at some other essential oils. If you're raising peppermint, it's going to cost a minimum of \$250,000 for the boiler and equipment to process it. When you're losing \$2/lb., you're sitting there with that investment and you don't have many options. The experiment station at Creston raised approximately 30 different essential oil crops that the equipment could be used for. But the existing language didn't cover other essential oil crops.

Opponents' Testimony:

{Tape : 1; Side : A; Approx. Time Counter : 3.27}

Questions from Committee Members and Responses:

SENATOR JERGESON Why eliminate line 17, develop and improve control measures for diseases and pests? Isn't that still an issue?

Rep. Somerville Page 2, line 7, still cover disease control. The ranchers and the farmers in the area will still work with the Creston Experimental Station to check on different diseases and how they impact on the new plants and see if they can come up with ways to fight these diseases.

SENATOR DEVLIN Did the price drop because of a glut world wide, or what's the main reason for the fall.

Roger DeYong It's supply, we're importing a little more from China and India. Their quality is inconsistent compared to ours, but that oil can be blended with our high quality oil. Washington and Oregon can double crop mint in certain years and have had really big yields the last of couple years. We can double crop once in a while in Flathead County, but it's not nearly as significant as what they can do there. It hurts the plant in the long term when we do that. Extra acres were taken out of production, but they produced much more in the acres that remain. Mint is like alfalfa, a 5 - 6 year crop, so the best years are the third and fourth years. It ends up being more like a 15 year cycle.

SENATOR DEVLIN It's a world wide glut rather than a lack of industry buying it?

Roger DeYong The amount being used has not changed. The United States is the big market. A little too much becomes way too much all of a sudden and the price starts going down. The end users and the brokers quit holding inventory, and the farmers end up holding it all. When it starts going the other way, it will swing because everyone will start building their inventories up.

SENATOR MESAROS Is the primary reason why Kalispell and northwestern Montana can't double crop due to the growing season or a disease problem?

Ron DeYong It's the growing season. If we get enough heat units we can do it.

SENATOR JABS Is this grown on a contract with price set or contract set after the fact?

Ron DeYong Both ways, there's spot market without a contract and with a contract. It's going more and more to contract. In the past when we were on the up end of the cycle everybody was doing better on the spot market. Now everyone is fighting to get contracts, just so they can see their oil.

SENATOR JABS If you get it all on a contract, you could stop these foreign oils coming in, but I suppose you're a long way from that.

Ron DeYong In the Kalispell area, we have really high quality but that's just a portion of the blend they're going to be using. They'll contract that portion they need for that blend, but they've got enough flexibility they can pick oils up in different areas and still make the blends work. The end users are in the driver's seat.

SENATOR JABS Is the contract set before the growing season starts?

Ron DeYong Yes, it varies, the longest contract you can get right now would be 3 years, if you can get that. The last few years it's been 1 year, I've got an old contract that finishes this next year that was 3 years.

{Tape : 1; Side : A; Approx. Time Counter : 3.35}

Closing by Sponsor:

Rep. Somerville There's a couple of big farmers in the Flathead Valley and I imagine in other places in Montana too, that still have 3 years of crop in their barns. Price started to drop about three years ago and they were trying to bet on the fact it would rise the next year. Now they're stuck with two years of mint. We want to be sure we get that mint out, develop the market for it and make contracts for all our mint. I don't want to see another farmer have to subdivide in order to survive. We have too many subdivisions there already and we're losing our open space.

SENATOR HOLDEN to carry.

HEARING ON HB 284

Sponsor: REPRESENTATIVE ROBERT STORY, HD 24, Park City

Proponents: Mike Volesky, Montana Association of Conservation Districts
Steve Schmitz, DRRC
Ron DeYong, Montana Farm Bureau

Opponents: None

Opening Statement by Sponsor:

Representative Robert Story, HD 24, HB 284 deals with conservation district laws. A conservation district is a "sub" unit of state government, much like a school district, that's governed by a board of elected supervisors who live in the district and administer the works the district does. Conservation districts are required by state law to handle issues that deal with management of natural resources on the local level.

One of the main things is administering the Natural Stream Bed Preservation Act, or the 310 law. Before you go into a stream or river in the State of Montana to work on the bed or banks, you have to have a permit from your conservation district. That has become one of the main jobs of conservation districts in some areas. In the Flathead County that's almost all they do because of development. In the past, most of the work they've done has been related to irrigation diversions and bridge abutments and rip rap projects. With the impact of development along the stream, a lot of the work is done with boat docks, walls to keep the river from washing peoples' yards away and a whole host of

other types of projects which are not only more complex but more contentious.

Conservation districts are starting to feel the pinch and starting to worry about the liability they face when they make these decisions and issue permits. There are several sections of this bill and I'll just take you through them. **REP. STORY** explained sections 1 through 4 of the bill.

Proponents' Testimony:

Mike Volesky, Montana Association of Conservation Districts, Funding for conservation districts is 1.5 mills on real property and doesn't amount to a lot of money in most districts. Soil conservation districts annual budget is in the neighborhood of \$10,000 and it ranges down to about a couple of thousand. Districts have come to increasingly rely on state and federal monies. You see a section there pertaining to receiving federal and state grants. Districts always wonder if in fact they're right in accepting those monies. Districts have increasingly been given more responsibility to help the state's landowners with conservation of their natural resources. A few of these laws will generally be revised by **HB 284**.

A lot of the language in the bill was written in the 1930's. This helps clear up that language. The standard for simple negligence is the centerpiece of this bill. Rather than simple negligence, providing for gross negligence for the employees and the conservation district supervisors, and given the lack of funding and access to legal services, training and resources that most government subdivisions have, the higher standard of negligence is justified. The amount of 310 permits the conservation have been handling over the years has increased greatly, from the few hundreds in the years back into the couple thousand.

The complexity has also increased. People are building boat houses in the middle of the Missouri River by Great Falls or the Flathead River or applying for golf courses where they want to completely realign the stream. Usually people with deep pockets. People who move in from out of state typically have some money and aren't afraid to take a little government subdivision like conservation district to court. These amendments are necessary to modernize the law and recognize the increased importance of conservation districts to natural resources in Montana. Passed out copies of testimony with further explanation. **SEE**

EXHIBIT (ags27a03)

Steve Schmitz, Chief of Conservation Districts Bureau, DNRC, read written testimony. SEE **EXHIBIT(ags27a04)**.

Ron DeYong, Montana Farmers Union, stated in the Flathead area the activity has definitely picked up in the type and variety of activity. We definitely would encourage this legislation.

{Tape : 1; Side : A; Approx. Time Counter : 3.50}

Opponents' Testimony: None

Questions from Committee Members and Responses:

SENATOR BECK Can they make a settlement with somebody without going to court for a judgment? I would think they would want to be forced to go in for a judgment before they made a settlement.

Don MacIntyre, Attorney with DNRC, A conservation district would be sued like any political subdivision, but before it goes to trial or to judgment, the parties agree to some sort of settlement. This makes it clear that as a part of that process, you can use the fund the district gets in that process. Actually, what 2-9-316 does is for all political subdivision and just makes the law clearer.

SENATOR BECK Wouldn't that still be a judgment by the court even for an out of court settlement?

Don MacIntyre A judgement tendered by a District Court means the court actually acts and enters some kind of judgment. When you settle a matter before it gets into court or even during trial, the court won't go into judgment on it.

SENATOR BECK If somebody complained to the conservation district and the district settled it, they can do it without going to a court, or being challenged in the courts, is that right? This doesn't give them the authority to just carte blanche make a settlement.

Don MacIntyre There are cases where the liability is so clear that you don't want to force the other party to bring action against you. Any political subdivision would want to settle. They'd turn it over to their insurance company and the insurance company would want to settle it before any action filed. It will allow it, but I don't think you'll see the kind of abuse you're talking about.

SENATOR TESTER I heard during testimony that these conservation districts have no money to buy insurance. I think that sheds a

little different light on what **SENATOR BECK** just asked. I think what would concern me is the possibility of a little inside work here. A conservation district is typically 5, 6, 7 people. What's the protection from an inside job on this one.

Don MacIntyre Conservation districts do have legal representation, generally the county attorney. Generally, whenever someone brings an action against a conservation district, they would look to their legal representative to find out whether or not they are negligent in the action they've taken before they would go forward. The district themselves would not make a decision to settle or not settle without legal representation.

SENATOR BECK Is that written someplace else in the law?

Don MacIntyre Yes.

SENATOR JABS We have 56 counties, 58 districts. Are some counties divided in half and which ones are they?

Mike Volesky Yes. In Montana, 95% of the time the conservation districts follow the county lines. There are exceptions where one district makes up a couple counties or part of two counties and situations where a district is only half a county. One of those is Big Sandy conservation district and Choteau conservation district. Another is in Beaverhead County, another is north Powell and Deer Lodge Counties. There are maybe about 5 of those exceptions.

SENATOR JABS states when I was on a conservation board, non point pollution, people came to build resorts along the river and to take fishermen and hunters out. I got a call from a person the other day. They think we're polluting the river with the runoff of irrigation water. The soil conservation board is involved in that. What's the legal ramification there?

Mike Volesky The primary job of conservation districts anymore is exactly that, prevention and abatement of non-point source pollution. It's actual on the ground project work, abating or cleaning up a problem, dealing with a problem somehow or preventing a problem or just education in new technology demonstration as far as non-point source pollution. They are still heavily involved in that, much more in the western part of the state than the eastern. You see situations similar to the Big Horn in the western part of the state. They have a gamut of activities they do across the state.

SENATOR JABS The board used to really go and get these non-point source pollution, but I haven't heard much in the last ten years.

Mike Volesky They apply for 319 Clean Water Act grants that deal with much of that pollution, and also some of the state programs of renewable resources and reclamation and development grants. There are some small programs available to them in DNRC. They're involved quite a bit locally in the total maximum daily loads efforts and in determining management plans to reach those goals. The 310 law is another example where they're making sure that activities in streams are permanent and end up being an education process for the landowners. They go out with the spokesmen from the district, FWP personnel and the landowner. Referring to **SENATOR TESTER's** question about the insurance, there are some districts that are well funded and do purchase insurance.

(TURN TAPE.)

SENATOR MESAROS You mentioned amendments. You're talking about changes in the bill, not additional amendments.

Mike Volesky Correct.

SENATOR HALLIGAN You are legal staff but do you provide any legal counsel to the conservation districts?

Don MacIntyre. Dept. of Natural Resources provides legal representation only to the agency. Because of the functions the conservation division has, we provide legal service to them and in a round about way provide legal service to the conservation districts. But we do not represent them if they were sued or were going to force an action against a party.

The primary legal representative is the county attorney in which the majority part of the district exists. Once they are sued, they have to turn it over to their legal representative. If the county attorney has a conflict of interest, he may then turn it over to the Attorney General's office. That's set out in the statute elsewhere. Last session the legislature provided a grant that allows for conservation districts to actually hire private legal counsel in these types of matters. They basically have three sources.

SENATOR HALLIGAN Who are the likely plaintiffs in any number of lawsuits.

Don MacIntyre Near your area in the Bitterroot, a 310 permit was not built in accordance to the way the permit was structured.

As a result of the action, the plaintiff, who was the applicant, took the position that the conservation district designed this particular bridge that then failed. They sued the conservation district saying the district was negligent in designing their project. The district was covered by insurance and the insurance company said because it was a question of simple negligence, they should settle. If it was stated gross negligence, they probably would not have settled nor would they have been found.

SENATOR HALLIGAN Is that a developer or who?

Don MacIntyre It was not a housing development, it was a Russian immigrant dealing with his land.

SENATOR HALLIGAN I'm trying to think of farmers and ranchers. If you're downstream and somebody is doing rip rap up stream or whatever, they might be plaintiffs because somebody has caused some damage, the water's taking a different route.

Don MacIntyre That is a situation that was brought up in conservation district meetings where we talk about this exact problem. There haven't been a lot of law suits but the potential is there.

SENATOR HALLIGAN The farmers and ranchers may be the ones that have the most to lose if we grant somebody immunity. We know that conservation districts don't have any money to pay these claims. You have to develop some balance here because I don't know how a conservation district would design a bridge. Do they actually have staff to be able to hire an engineer that could design a bridge?

Don MacIntyre The example I gave you was one where the applicant, who has a responsibility to design, said the conservation district, in granting the application, ultimately redesigned their project. Conservation districts are not in the business of designing and that's why we believe gross negligence is a good standard and does protect the other farmers and ranchers.

It's not only gross negligence, it's also committed in bad faith, malicious purpose. For example, if you got in one of these neighbor versus neighbor, one of the neighbors on the conservation district board refuses to grant a permit and your land erodes away, that would be malicious purpose. These conservation districts and supervisors are volunteers, farmers and ranchers, that undertake what has become a very large responsibility in 310 law administration. It's trying to protect them when they're acting in a gross manner.

SENATOR HALLIGAN How many would you say there's been in the last five years.

Don MacIntyre There have been very few and I don't think any have gone to trial. I think the reason is pretty much what Mr. Schmitz was saying, 310 is becoming more and more important and there's becoming more activity. We really didn't have to concern ourselves with liability the first 15, 20 years. As more development is taking place, the risk of lawsuits is becoming greater.

SENATOR HALLIGAN Because it's enforcing federal 310 law, or do we have a state law as well.

Don MacIntyre The 310 law is a state law, administration of state law at a local level. Originally this kind of hydrologic project protection with Fish, Wildlife & Parks only applied to State Government. In the 1970's when the law was broadened, there was a concerted decision by the legislature not to give FWP or any other state governmental entity that regulatory authority. They wanted it at the local level. Conservation districts were the ones that ultimately accepted that responsibility.

SENATOR TESTER When the board is granting these 310 permits, they do have professional people giving them recommendations, correct?

Don MacIntyre They have the ability to have that but it's not always the case. There is a grant program that allows for the hiring of engineers. Most cases, smaller projects, what you have is representatives from FWP, you may have someone from Department of Environmental Quality and the boards themselves. They rely heavily on the information from the applicant.

SENATOR JABS The soil conservation district that works with the federal man there, he's the one that designs or gives us advice.

Don MacIntyre That's right. National Resource and Conservation Service does provide planning and engineering services.

SENATOR BECK If the conservation district issues a 310 permit and doesn't listen to the experts, allows somebody to clean the stream and of course, erosion comes down and washes sand into the next guy's ditch, that's where the conservation district can get sued. Vice versa, if it's brought to the conservation district's attention that somebody is cleaning the stream and they stop that individual, a lot of times Fish and Game will come after the district and want to take action for not acting on stopping that person. They do have a liability exposure.

SENATOR JABS Going back to non-point pollution, could the soil conservation be drawn into this, say they're not doing their job by making us clean the water up before it goes down the river?

Don MacIntyre It's a much more difficult question as to what the liability of the conservation district would be. The conservation district doesn't have an affirmative duty to clean up water. Just because there is non-point source pollution problem from the farmer/rancher doesn't mean the conservation district has responsibility.

SENATOR HALLIGAN The counties, I thought, had general authority to be able to go up to 10 mills to pay a judgment. Now we're adding that conservation district authority in Sub B over on page 2. If a conservation has a judgment against them, can they ask the county commissioners to level the 10 mills?

Don MacIntyre Section 76-15-320 would now give the conservation district authority to satisfy judgment. The conservation districts also have, I believe, a specific section in their own law as for how they can which raise funds to which they could apply against a judgment as well.

SENATOR HALLIGAN I didn't see that anywhere in the bill about what property tax they would go to levy.

Don MacIntyre They would use their own authorities they have under their statutory mechanism. The drafters brought attention to 316 being on the books and this would be a mechanism to tie into for purposes of judgments and settlements. They're were just trying to bring them, as a political subdivision, under that account.

SENATOR BECK This section of law does include county government and everything, it gives them the authority to make a settlement also.

Don MacIntyre County governments are acting like this now. The law doesn't use the term settlement but it's clearly happening.

SENATOR JABS It doesn't have to be 1.5 mills, in our district it was .75 for awhile and then upped it to 1 mill, they can ask the commissioners for any amount.

REP. STORY Conservation district laws allows the district to ask the commissioners to mill up to 1.5 but no more.

{Tape : 1; Side : B; Approx. Time Counter : 4:13}

Closing by Sponsor:

REP. STORY This is a good bill that brings some of the laws up to date. The main point is whether you feel districts should have this standard of negligence changed, and I would submit to you they do, although we have not seen a lot of lawsuits yet. You all know how much more contentious society gets once you get away from neighbor to neighbor on the land, and start having people come in and get their 5 acres or 10 acres. You end up with a lot more issues to deal with.

It's hard enough to find people to serve on these districts right now. **SENATOR JABS**, you mentioned you had been a supervisor in the past and some of the projects your district had worked on and you weren't seeing some of that activity. Part of the reason is we, like a lot of boards, have supervisors that have served for 20 or 30 years and are still in the position. They're doing a good job with what they're required to do, the 310 law, but they aren't looking for other projects and, of course, having to chase down grant funding. The last section of the bill requires 2/3 vote because of the liability change for this bill to become effective.

SENATOR GROSFIELD to carry.

{Tape : 1; Side : B; Approx. Time Counter : 4.16}

SENATOR TESTER passed out a copy of the bill North Dakota is considering regarding country of origin labeling. Since introduction of bills can only be done by committee at this point, he wanted the committee's support in introducing a bill like this for Montana.

A discussion was held. It would put a large burden on retailers to have to identify county of origin for all agricultural products. It possibly belongs at the wholesale level. Did any other states send a resolution to Congress to urge labeling? In a lot of cases, the wholesaler or importer is not going to be reachable as they are out of the state. This would be a nightmare to implement and perhaps a resolution would be more appropriate. How would it be monitored and what would the fiscal note be? It should be a national program. See what North Dakota and Idaho are doing on these bills. We have until 2/13 for committee to submit a bill. Committee will sit on this a couple days before taking any action.

EXECUTIVE ACTION ON HB 254

Motion/Vote: SEN. BECK moved that HB 254 BE CONCURRED IN. Motion carried unanimously.

EXECUTIVE ACTION ON HB 284

Motion: SEN. JERGESON moved that HB 284 BE CONCURRED IN.

SENATOR HALLIGAN Now the districts won't have to conduct themselves with reasonable care. They can go out and make some ordinary negligent mistakes and your farmlands may have problems with it. It's only gross negligence or bad faith. You guys might not be able to sue. It's gotten to be such a big item, maybe Fish and Game or Dept. of Agriculture needs to be doing this as part of their administrative authority rather than the conservation districts.

Vote: Motion HB 284 carried unanimously.

ADJOURNMENT

Adjournment: 4:31 P.M.

SEN. REINY JABS, Chairman

CAROL MASOLO, Secretary

RJ/CM

EXHIBIT (ags27aad)